IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE THIRTY FIRST DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE B. SUDERSHAN REDDY

and
THE HON'BLE MR JUSTICE K.C. BHANU

WRIT PETITION NO : 9040 of 2004

Between:

Sharpscan & Prints Ltd. a Public limited company incorporated
under the provisions of the Companies Act, 1956 and having its Registered office at 1-6-, Madhapur,
Cyberabad, Hyderabad-33, Rep by its Managing Director, A Veeraswamy

..... PETITIONER

AND

1 The Assistant Commissioner (EPCG), Office of the Commissioner of Customs (Export),
Custom House, No. 60, Rajaji Salai, Chennai - 600 001.
2 The Commissioner of Customs (Export),
Custom House, No. 60, Rajaji Salai, Chennai - 600 001.
3 The Directorate of Revenue Intelligence, Regional Unit, 8-2-686/16/1/A, Plot No. 499,
Road No. 12, Banjara Hills, Hyderabad.
4 Andhra Bank, Jubilee Hills Branch,
Hyderabad - 500 033, rep by its Chief Manager

.....Respondents

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an appropriate writ, order, direction more particularly a Writ of Mandamus, declaring the actions of the respondents No. 1 to 3 initiating penal action against the petitioner company including invoking the bank guarantee vide letter 20-4-2004 as harsh, arbitrary, illegal and against the principles of natural justice and in violation of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and

also amended Handbook of Procedures issued by the DGFT in exercise of powers conferred on him under paragraph 2.4 of the Export and Import Policy 2002-2007 and accordingly declare the same as void and inoperative and pass such other orders as this Hon'ble Court deems fit and proper.

Counsel for the Petitioner: MR.Y.VENKATESH REDDY

Counsel for the Respondent Nos1 to 3.: MR.A.RAJASHEKAR REDDY (SC FOR CG)

Counsel for the Respondent No.4: Mr. Nooty Rama Mohana Rao

The Court made the following :

The Hon'ble Sri Justice B. Sudershan Reddy

a n d

The Hon'ble Sri Justice K.C. Bhanu

WRIT PETITION No. 9040 OF 2004

O R D E R: **(**per Sri Justice K.C. Bhanu**)**

The present writ petition is filed praying this court to issue an appropriate writ order or direction, more particularly a writ of Mandamus, declaring the action of respondents 1 to 3 initiating penal action against the petitioner-company including invoking the bank guarantee vide letter dated 20.4.2004 as arbitrary, illegal and against the principles of natural justice and in violation of the provisions of Sick Industrial Companies (Special Provisions) Act 1985 and also amended Handbook of Procedures issued by the Director General of Foreign Trade (DGFT) in exercise of powers conferred on him and accordingly declare the same as void and inoperative.

The brief facts that are necessary for the disposal of the present writ petition are as follows:

The petitioner is a public limited company incorporated under the provisions of the Companies Act 1956 in the State of Andhra Pradesh in the year 1995 and the petitioner-company is

engaged in the business of printing books, brochures, leaflets and similar printing material. The petitioner-company for the purpose of offering quality printing services had sought to import printing machinery in terms of Export-Import Policy, 1997-2002 under the Export Promotion Capital Goods Scheme (for short, 'EPCG' Scheme) by availing the benefit of concessional rate of customs duty and obtained import licence from the 2nd respondent. After obtaining necessary permission, the petitioner-company imported from Germany one Heidelberg five colour offset printing press along with accessories valued at Rs.3,86,91,637/-. Having availed the concessional rate of customs duty, the petitioner-company is under obligation to export printed books, brochures, leaflets and printed material valued at US$ 3816684/- within five years from the date of issue of licence. The petitioner-company by way of assurance about its export commitment had also executed a bond for Rs.83.00 lakhs and also furnished a bank guarantee for Rs.83.00 lakhs towards the value of the customs duty saved by it. The imported machinery arrived in India in the year 1998 itself, but the petitioner-company could not immediately clear the same due to delay in sanction and release of financial assistance by the financial institutions. Consequently, there was a delay by two years in implementation of the entire project and the petitioner-company could commence its production only in the year 2000 at Madhapur, Hyderabad. Thereafter there was a fire accident in the factory premises in the year 2001 which resulted in substantial loss to the petitioner-company. Lack of working capital coupled with fire accident, cut throat competition and locational disadvantages had adversely affected the financial performance of the petitioner-company and consequently it became sick industrial company as defined under the provisions of Sick Industrial (Special Provisions) Act ('SICA' for short) and the petitioner-company was referred to the Board for Industrial and Financial Reconstruction (BIFR) and reference case No. 469 of 2002 is pending before it. After intimating the banks and financial institutions in January 2003, the petitioner-company shifted the plant and machinery to 11-6-870, Opposite Pearl Residency, Lakdi-ka-pool,

Hyderabad.

While the things stood thus, the 3rd respondent issued summons dated 25.3.2004 under Section 108 of the Customs Act, 1962 to the Managing Director of the petitioner-company calling upon him to produce documents relating to import of printing machinery under EPCG Scheme. On the same day the 3rd respondent took symbolic possession of the printing machinery after conducting panchanama. The Director General of Foreign Trade, New Delhi in exercise of powers conferred on him under the Export-Import Policy 2002-2007 made certain amendments in Handbook of Procedures whereby a company registered as a sock company with the BIFR may apply for extension in export obligation period for fulfillment of export obligation to the DGFT. The amendment further enables the DGFT to grant extension up to 12 years for fulfillment of export obligations. Thereafter, the petitioner-company made an application to DGFT vide application dated 7.4.2004 seeking extension of period for fulfillment of export obligation. The office of the 2nd respondent also sent summons u/Sec. 108 of the Customs Act, 1962 to the Managing Director of the petitioner-company to appear before him with all relevant documents on 31.3.2004. Accordingly the Managing Director of the petitioner-company appeared before the customs authorities and informed them that the petitioner-company became sick and that it has taken steps for seeking extension of period for fulfilling the export obligation. In the meanwhile, the 3rd respondent issued show-cause notice 8.4.2004 calling upon the petitioner-company to show cause to the 2nd respondent as to why penalty should not be levied on him for contravening the provisions of the Customs Act, 1962, for which a reply dated 5.5.2004 was given to the 2nd respondent wherein it was stated that the petitioner-company has already made an application to the DGFT for extension of time for fulfillment of export obligation and the same is under active consideration and therefore requested the 2nd respondent not to initiate any action against the petitioner-company in the meanwhile.

Even without waiting for the reply from the petitioner-company and without taking into consideration the fact that the petitioner's application for extension of period for fulfillment of export obligation is pending before the DGFT, the 1st respondent issued letter dated 20.4.2004 to the 4th respondent-bank invoking the bank guarantee and seeking payment of Rs.83.00 lakhs within seven days from the date of receipt of the said letter. The 4th respondent, in turn, has addressed a letter dated 8.5.2004 to the petitioner-company calling upon it to furnish an amount of Rs.41.00 lakhs before 11.5.2004 as it already has an amount of Rs.42.00 lakhs with it as margin money failing which it would take suitable steps for recovery of the money. The petitioner contends that the action of the 1st respondent initiating penal action against the petitioner-company including invoking the bank guarantee is arbitrary and illegal and violative of the protection offered under the provisions of SICA and the SICA provisions overrides the provisions of the Customs Act, 1962. Thus the action of the 1st respondent invoking the bank guarantee without obtaining the prior permission of the BIFR has no validity and cannot be enforced. The action of the 1st respondent invoking the bank guarantee results in irretrievable injustice to the petitioner as the 1st respondent has not even given a fair chance to the petitioner to prove that it can fulfil its export obligations. Hence the present writ petition.

The 3rd respondent filed counter affidavit admitting about the import of certain machinery but contended that the petitioner-company failed to fulfil the export obligation as stipulated under the licence, thereby contravened the provisions of customs notification No.28/97 Customs dated 1.4.1997 as well as the conditions of the licence. Therefore, the 3rd respondent detained the machines under panchanama dated 25.3.2004. At the time of clearance of the said goods the petitioner-company executed bond for Rs.1.66 crores with the 1st respondent and also furnished bank guarantee No.32/2000 dated 14.1.2001 for an amount of Rs.83.00 lakhs from the 45h respondent in terms of the aforesaid notification. During the course of

investigation it was found that the imported machinery was functioning in the premises other than the premises declared in the licence. The petitioner-company was summoned and the statement was recorded u/Sec. 108 of the Customs Act, 1962 wherein the petitioner-company admitted about the contraventions. After investigation of the case, a show-cause notice dated 8.4.2004 under the Customs Act 1962 was issued to the petitioner. As provided under the aforesaid notification, the 1st respondent initiated action to enforce the bank guarantee furnished by the petitioner. As per condition No. 6 of the Notification No. 28/97 dated 1.4.1997 the licensing authority may grant regularization of shortfall, in export obligation, not exceeding 5% of such export obligation. In the instant case, the petitioner-company has not made any exports and completely failed to fulfil the export obligation and therefore the petitioner-company is not entitled to get any extension of time for fulfilling the export obligation by the concerned authority. The petitioner-company has misued the provisions of the EPCG licence and contravened the aforesaid conditions of the customs notification. Therefore the petitioner-company was issued show cause notice under the Customs Act, 1962. As provided under the Act, the petitioner-company is given opportunity to represent its case before the 2nd respondent. The contention that the application of the petitioner for extension of export obligation period is under active consideration of DEFT is incorrect. The DGFT, Hyderabad has not given any extension of export obligation period so far and no application for extension of export obligation period has been made by the petitioner-company so far. The petitioner-company executed a bond and bank guarantee in terms of condition No.2 of notification No.28/97 Customs dated 1.4.1997 binding itself to fulfil the export obligation equivalent to four times of the CIF value of the goods imported within a period of five years from the date of issue of licence. The petitioner-company failed to export goods during the stipulated period of five years and to discharge a minimum of 25% of export obligation prescribed for any particular year for three consecutive

years, thereby liable to pay the whole of the customs duty leviable on the goods imported but for the exemption contained in the above notification. Therefore, the 1st respondent has rightly initiated action invoking the bank guarantee. The facts of occurrence of fire accident in the petitioner-company and registration with BIFR as sick company were not intimated to the respondents. The 3rd respondent has no instructions from the BIFR with regard to duty liability to the petitioner-company. It is not correct that SICA provisions overrides the provisions of the Customs Act 1962. The petitioner-company shifted the imported machines from the premises declared in the licence to elsewhere without informing the customs/licensing authority, which contravenes the licence granted to the petitioner. The petitioner-company has got enough opportunity to contest its case before the 2nd respondent under Section 128 of the Customs Act. The petitioner has got further remedial measures in the form of Appellate Tribunal i.e. CESTAT in case it is aggrieved by the decision of the adjudicating authority. Hence, he prays to dismiss the writ petition.

Sri S.R. Ashok, learned senior counsel appearing for the petitioner, contended that the petitioner-company did not fulfil its export obligation as stipulated under the licence due to fire accident and also the delay in release of financial assistance by the financial institutions and therefore the petitioner-company became sick company and as per the amendments of the Handbook of Procedures the petitioner-company applied for extension of export obligation period for fulfillment of export obligation and the Managing Director of the petitioner-company appeared before the Customs authorities and gave a statement that the petitioner-company became sick company and a reference case is pending before the BIFR and when the petitioner-company is taking steps for extension of the period for fulfillment of the export obligation, invoking the bank guarantee without obtaining prior permission of BIFR is clearly illegal. He, therefore, prays to allow the writ petition and issue a Mandamus

not to take any penal action against the petitioner-company.

On the other hand, Sri A. Rajasekhar Reddy, learned senior standing counsel for Central Government, contended that the petitioner-company did not make any export so far; the export obligation period was expired on 23.2.2003 and the petitioner-company failed to export the goods during the stipulated period of five years and failed to discharge a minimum of 25% of the export obligation prescribed for any particular year for three consecutive years and therefore a show-cause notice was given. The petitioner-company can as well contest the case before the 2nd respondent; that the guarantee furnished by the bank to the respondents is an unconditional guarantee and therefore it can be encashed. Hence, he prays to dismiss the writ petition.

The petitioner-company had imported certain printing material valued at 3,86,41,691/- in terms EPCG Scheme under Licence No.2108635 dated 24.2.1998 issued by the office of the Joint Director General of Foreign Trade, Hyderabad. For having availed the concessional rate of customs duty the petitioner-company is under obligation to export printed books, brochures etc. but the petitioner-company failed to export the goods during the stipulated period of 5 years. Further, the petitioner-company also failed to discharge a minimum of 25% of export obligation prescribed for any particular year for three consecutive years. Even in the affidavit filed in support of the writ petition it is admitted that the imported machinery arrived in India in the year 1998 itself but the petitioner-company could not immediately clear the same due to delay in sanction and release of financial assistance by the financial institutions. It is also stated that a fire accident took place in the year 2001 in the factory premises of the petitioner-company. A show cause notice dated 8.4.2004 was issued calling upon the petitioner-company as to why penalty should not be imposed upon it under the provisions of the Customs Act, 1962 for contravening the conditions of the customs notification No.28/97 dated 1.4.1997. As per the said notification, if the importer fails to discharge a minimum of 25% of the export

obligation prescribed for any particular year for three consecutive years, he is liable to pay forthwith the whole of the duty of the customs leviable on the goods imported but for the exemption contained in the notification. The petitioner-company contends that for the said show cause notice an explanation was given to the 2nd respondent requesting him not to initiate any action against the petitioner-company because the petitioner-company has already made an application to the DGFT for extension of time for fulfillment of export obligation and it is under active consideration. There is a serious dispute with regard to the pendency of the application before the DGFT for extension of time for fulfillment.

The 2nd respondent is the quasi judicial authority under Section 128 of the Customs Act 1962. Under Section 129 of the said Act, the petitioner has also got power to appeal before the Appellate Tribunal if aggrieved by the decision of the 2nd respondent. In appropriate cases instead of directing the petitioner to avail the alternative remedy this court can exercise its writ jurisdiction at least in three situations, namely, (1) where the writ petitioner seeks enforcement of any fundamental rights, (2) where there is any violation of principles of natural justice and (3) where the orders or the proceedings impugned are wholly without jurisdiction or *vires* of an Act is under challenge. It is not a case of violation of any fundamental rights or principles of natural justice. So also it is not the case of the petitioner that the 3rd respondent has no jurisdiction. The petitioner has got every right to contest the case and put-forward its case before the 2nd respondent. Therefore, in the absence of the above aspects, we are of the considered opinion that the petitioner-company has got a remedy by way of recourse to contest the case before the 2nd respondent.

While asking for not to take any penal action, the petitioner-company requests the court to direct the respondents not to encash the bank guarantee. The bank guarantee No.32/2000 dated 14.1.2001 for a sum of Rs.83.00 lakhs was executed for

fulfillment of export obligation. The relevant clause of the said bank guarantee No.32/2000 reads as follows:

> "We, Andhra Bank, Jubilee Hills Branch, Hyderabad (hereinafter referred to as Bank) at the request of the importer/exporter do hereby unconditionally and irrevocably undertake to pay the Government an amount not exceeding Rs.83,00,000/- (Rupees Eighty Three Lakhs Only) against any loss or damage caused to or suffered by the Government by reason including the export obligation mentioned therein;
>
> We Andhra Bank, Jubilee Hills Branch, Hyderabad do hereby undertake to pay the amounts due and payable under this guarantee without any demur or protest, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused or suffered by the Government by reason of breach of the Importer/Exporter of any of the terms of condition of the said licence. Any such demand made on the Bank shall be conclusive as regards the amount and payable by bank under these present.
>
> We undertake to pay the government any money so demanded notwithstanding any dispute or disputes raised by the importer/exporter in any suit or proceeding pending before any court of tribunal relating thereto and our liability under these presents being absolute and unequivocal".

From the terms of the bank guarantee it can be said that it is unequivocal and unconditional and that the amount would be paid without any demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The law is well settled with regard to the

encashment of bank guarantee.

In a decision in **State of Maharashtra v. National Construction Co.**, the Supreme Court held as follows:

> "At this juncture it seems necessary to analyse the law relating to bank guarantees. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to the allegations of breach by resorting tolitigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee. (See United Commercial Bank v. Bank of India (1981 (2) SCC 766 at 784,) Centax (India) Ltd. v. Vinmar Impex Inc. (1986(4) SCC 136) and U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (1988(1) SCC 174)".

In another decision reported in **Hindustan Construction Co. Ltd. v. State of Bihar** the apex Court held as follows:

> "What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demure or objection and irrespective of any dispute that might have cropped up or might

have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarntee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad".

In another decision in **Daewoo Motors India Limited v. Union of India** the Supreme Court held:

> "It is too well settled proposition to admit of detailed reasoning that for encashment of bank guarantee, the bank cannot have any valid resistance, except, of course, in a case of fraud".

In yet another decision reported in **National Highways Authority of India v. Ganga Enterprises**, the Supreme Court held as follows:

> "There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on-demand bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an "on-demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee".

Therefore, from the above decisions of the apex court it is clear that in case of invocation of bank guarantee if an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize the bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a bank guarantee is bound to honour the same as per its terms irrespective of any disputes raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. If there is a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. Here, it is not a case of fraud because there is no allegation in the affidavit accompanying the petition that the 3rd respondent seeks to take advantage to encash the bank guarantee. Therefore, dealing with the question of fraud, it has to be an established fraud. In yet another decision in **U.P. State Sugar Corporation v. Sumac International Ltd**, the apex court held

"the second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction of the guarantee and the adverse effect of an injunction of commercial dealings in the country".

The irretrievable injury has to be such a circumstance which would make it important for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary by way of restitution. If ultimately the petitioner succeeds

in getting the extension of time for fulfillment of export obligation, he can as well recover the amount from the Government.

It is not for us to decide a disputed question of fact exercising the extraordinary jurisdiction under Article 226 of the Constitution of India. It is also not for this court to verify whether the application of the petitioner for extension of export obligation is pending with DGFT or whether it is under active consideration or not, as the same have to be pleaded and proved before the 2nd respondent who is admittedly a quasi-judicial authority under Section 128 of the Customs Act, 1962. It is also unnecessary under these proceedings to decide whether the provisions of SICA overrides the provisions of the Customs Act.

A feeble attempt has been made by the learned counsel for the petitioner that before expiry of time mentioned in the show cause notice dated 8.4.2004 the 3rd respondent invoked the bank guarantee. We are unable to accept the same because the bank guarantee furnished by the petitioner-company is unconditional one. The show-cause notice dated 8.4.2004 is mainly for the purpose of imposing penalty under Section 112-A of the Customs Act, 1962. Incidentally, in this notice it is stated as to why the bank guarantee should not be enforced and should not be adjusted towards the duty liability. Since the bank guarantee is unconditional one, the 3rd respondent can encash the bank guarantee as the petitioner-company has violated the terms and conditions of the licence.

For the aforesaid reasons, we do not find any merit in the writ petition and the writ petition shall accordingly stand dismissed, in the circumstances, without costs. Consequently, the interim order in WPMP No.11645 of 2004 dated 11.5.2004 shall stand vacated.

B. Sudershan Reddy, J.

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K.C. Bhanu, J.

Date: 31 --08—2004.

MVB.

..... REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1 The Assistant Commissioner (EPCG), Office of the Commissioner of Customs (Export), Custom House, No. 60, Rajaji Salai, Chennai - 600 001.
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Custom House, No. 60, Rajaji Salai, Chennai - 600 001.
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